Appendix

Additional Details on the CWR

ED_001271_00018732-00015 FOIA 2020-001799-0000128

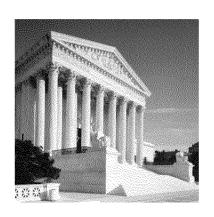
Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Jurisdictional; did not define tributary		Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Jurisdiction included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	
Isolated or "Other" Waters	Jurisdiction included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce	Included "other waters" where there was a significant nexus to traditionally navigable .water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

ED_001271_00018732-00016 FOIA 2020-001799-0000129

"Waters of the US" and Clean Water Act Programs



- CWA establishes many programs to protect quality of WOTUS:
 - Section 303(c): state-developed water quality standards setting waters' quality goals
 - Section 303(d): "Total Maximum Daily Load" (TMDL) plans to bring waters into compliance with water quality standards
 - Section 311: oil spill prevention and clean-up
 - Section 401: state/tribal certification that federal permits and licenses are consistent with CWA and local requirements
 - Section 402: "NPDES" permit program for "end of pipe" discharges of pollutants from sources including factories, sewage treatment plants, and other point sources
 - o Section 404: permit program for discharges of dredged/fill material



Waters of the US at the U.S. Supreme Court

- Riverside Bayview (1985): Wetlands adjacent to TNWs are properly part of WOTUS
- SWANCC (2001): Presence of migratory birds by itself not enough to make "other waters" WOTUS
- Rapanos (2006): Tributaries, adjacent wetlands. Split decision on what WOTUS includes
 - Scalia: "Relatively permanent" or at least seasonal waters; wetlands with a "continuous surface connection"
 - Kennedy: Waters with a "significant nexus" affecting physical, chemical, or biological integrity of downstream waters
 - o All: WOTUS includes more than just waters that are navigable

18

ED_001271_00018732-00018 FOIA 2020-001799-0000131

Waters of the US and Legal Challenges Posed By *Rapanos*

- Rapanos has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinions
 - o These cases arise in more than 2/3 of all U.S. states
 - U.S. position: water is jurisdictional if meets <u>either</u> the Kennedy or Scalia standards
- All but one U.S. Circuit Courts of Appeal have agreed with U.S. regarding what standard applies
 - Most hold either Kennedy or Scalia standard can be used
 - One held Kennedy standard only
 - None say Scalia standard only
- Supreme Court has rejected all petitions for review

From: Shapiro, Mike

3233 WJCE Call in Nonresponsive Conference Code/ Ex. 6 Location:

Importance: Normal

Subject: Proposed Outreach Strategy for WOTUS Rulemaking Start Date/Time: Mon 5/1/2017 2:15:00 PM End Date/Time: Mon 5/1/2017 3:00:00 PM OW Meeting Request Form outreach.docx

WOTUS2 outreach overview 4-28.docx

From: Shapiro, Mike

Location: 3233 WJCE **Importance:** Normal

Subject: Brown Bag w/ Environmental Stakeholders Call in Nonresponsive Conference Code/ Ex. 6 passcode (Nonresponsive Conference Code/ Ex. 6 passcode)

Categories: Orange Category

Start Date/Time: Mon 4/24/2017 4:00:00 PM **End Date/Time:** Mon 4/24/2017 5:00:00 PM

Enviro Stakeholder Meeting Agenda.docx

Enviro Stakeholder Meeting Agenda (ANNOTATED).docx

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]; McGartland, Al[McGartland.Al@epa.gov]; Nickerson, William[Nickerson.William@epa.gov]; Owens, Nicole[Owens.Nicole@epa.gov]; Rees, Sarah[rees.sarah@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Peck, Gregory@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]

From: Wendelowski, Karyn
Sent: Fri 6/9/2017 5:58:28 PM
Subject: RE: Update from OMB

WOTUS - US 6thCir file-stamped response brief.pdf

Hi Mindy – Here's the brief.

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Let me know if you need anything else.

Karyn

Karyn Wendelowski

Attorney-Advisor

Water Law Office

Office of General Counsel

(202)564-5493

From: Eisenberg, Mindy

Sent: Friday, June 09, 2017 1:39 PM

To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-

Wong.Benita@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven

<Neugeboren.Steven@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>;

Wehling, Carrie < Wehling. Carrie@epa.gov>; Kupchan, Simma < Kupchan. Simma@epa.gov>;

Downing, Donna < Downing.Donna@epa.gov>; McDavit, Michael W.

<Mcdavit.Michael@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>; McGartland, Al

<McGartland.Al@epa.gov>; Nickerson, William <Nickerson.William@epa.gov>; Owens,

Nicole < Owens. Nicole@epa.gov>; Rees, Sarah < rees.sarah@epa.gov>; Christensen, Damaris

<Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Peck, Gregory

<Peck.Gregory@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>

Subject: Update from OMB

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Mindy

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

To: Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Grevatt, Peter[Grevatt.Peter@epa.gov]; Southerland, Elizabeth[Southerland.Elizabeth@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]; Klos, Caroline[Klos.caroline@epa.gov]; Gonzalez, Yvonne V.[Gonzalez.Yvonne@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]; Christensen, Christina[Christensen.Christina@epa.gov]; Spraul, Greg[Spraul.Greg@epa.gov]; Fontaine, Tim[Fontaine.Tim@epa.gov]; Wadlington, Christina[Wadlington.Christina@epa.gov]

From: Thomas, Latosha

Sent: Tue 6/6/2017 2:44:53 PM

Subject: Agendas for Tomorrow's Environmental Stakeholder Meeting (6.6.17 @12PM)

Environmental Stakeholders Meeting Agenda 6.7.17. (ANNOTATED).docx

Environmental Stakeholders Meeting Agenda 6.7.17.docx

Hi All,

Here are both versions of tomorrow's agenda. Thanks!

Latosha Thomas

U.S. Environmental Protection Agency

Office of Water (On Detail)

(202) 564-0211 (desk)

Personal Phone / Ex. 6

thomas.latosha@epa.gov

Environmental	Stakeholders	Meeting
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June 7, 2017

Nonresponsive Conference Code/ Ex. 6 Code: Nonrespo	onsive Conference Code/ Ex. 6
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Budget

Budget Talking Points, updated May 23, 2017

FY17

Deliberative Process / Ex. 5

FY18

Deliberative Process / Ex. 5

WOTUS/CWR

Deliberative Process / Ex. 5

Since the E.O. was issued, EPA has taken several actions.

Deliberative Process / Ex. 5

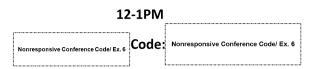
<u>Update on implementation of the Stoner Nutrient Framework letter endorsed</u> by Administrator Pruitt

Deliberative Process / Ex. 5

<u>Information on how the conductivity guidance will be handled (Draft published</u> 12/23/16)

Environmental Stakeholders Meeting

June 7, 2017



- Budget
- WOTUS/CWR
- Update on Implementation of the Stoner Nutrient Framework Letter Endorsed by Administrator Pruitt
- Information on How the Conductivity Guidance will be Handled

To: Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]
Cc: Goodin, John[Goodin.John@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Peck,

Gregory[Peck.Gregory@epa.gov]; Schmauder, Craig R SES (US)[craig.r.schmauder.civ@mail.mil]

From: Eisenberg, Mindy
Sent: Fri 5/26/2017 7:54:03 PM

Subject: step 2 options paper WOTUS2 options v2.docx

ATT00001.htm

Mike and Benita,

For your review - attached is our proposed options table for our meeting with Sarah and others on Wednesday afternoon. OGC/OWOW/Corps took the lead in preparing based on our conversation two weeks ago with Sarah and building off of an earlier options table prior to switching to the two step. We're looking for comments from folks (see below) by Tuesday so that we can send it to Sarah/Justin/David.

Thanks,

Mindy

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

Begin forwarded message:

From: "Christensen, Damaris" < Christensen.Damaris@epa.gov>

Date: May 26, 2017 at 2:17:44 PM EDT

To: "Peck, Gregory" < Peck. Gregory@epa.gov>, "Goodin, John" < Goodin. John@epa.gov>, "Downing, Donna" < Downing. Donna@epa.gov>, "Kwok, Rose" < kwok.rose@epa.gov>, "Neugeboren, Steven" < Neugeboren. Steven@epa.gov>, "Wehling, Carrie" < Wehling. Carrie@epa.gov>, "Wendelowski, Karyn" < wendelowski.karyn@epa.gov>, "Campbell, Ann" < Campbell. Ann@epa.gov>, "Nickerson, William" < Nickerson. William@epa.gov>, "Flannery-Keith, Erin" < Flannery-Keith. Erin@epa.gov>, "Frazer, Brian" < Frazer. Brian@epa.gov>, "David. F. Dale@usace.army.mil" < David. F. Dale@usace.army.mil>, "Hewitt, Julie" < Hewitt. Julie@epa.gov>, "McDavit, Michael W." < Mcdavit. Michael@epa.gov>, "Stokely, Peter" < Stokely. Peter@epa.gov>, "Jensen, Stacey M CIV USARMY HQDA (US)" < Stacey. M. Jensen@usace.army.mil>, "jennifer.a.moyer@usace.army.mil>, "Orvin, Chris" < Orvin. Chris@epa.gov>, "Kupchan, Simma" < Kupchan. Simma@epa.gov> Subject: step 2 options paper

Hi all,

Attached is a table laying out a variety of options for describing the scope of CWA jurisdiction in preparation for a meeting with Sarah, Justin and David on May 31. We would appreciate your thoughts and edits, preferably on the Sharepoint site (link below), although I have attached a Word document for your convenience.

Nonresponsive Internal URL/ Ex. 6

Deliberative Process / Ex. 5

Damaris

To: Neugeboren, Steven[Neugeboren.Steven@epa.gov] Cc: Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov] From: Eisenberg, Mindy Sent: Fri 5/26/2017 1:45:01 PM Subject: Re: responding to OMB's comments on draft proposed rule Thanks Steve. I'll update the note and send up to Sarah et al. Sent from my iPhone On May 25, 2017, at 9:03 PM, Neugeboren, Steven < Neugeboren. Steven@epa.gov > wrote: **Deliberative Process / Attorney Client Ex. 5**

Deliberative Process / Attorney Client Ex. 5

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Eisenberg, Mindy

Sent: Thursday, May 25, 2017 6:08 PM

To: Shapiro, Mike < Shapiro. Mike@epa.gov >

Cc: Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John

<Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Peck,

Gregory < <u>Peck.Gregory@epa.gov</u>>; Kwok, Rose < <u>Kwok.Rose@epa.gov</u>> **Subject:** RE: responding to OMB's comments on draft proposed rule

Thanks Mike.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Mindy

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Shapiro, Mike

Sent: Thursday, May 25, 2017 5:50 PM

To: Eisenberg, Mindy < Eisenberg. Mindy @epa.gov >

Cc: Best-Wong, Benita < Best-Wong, Benita@epa.gov>; Goodin, John

< Goodin.John@epa.gov>; Neugeboren, Steven < Neugeboren.Steven@epa.gov>; Peck,

Gregory < <u>Peck.Gregory@epa.gov</u>>; Kwok, Rose < <u>Kwok.Rose@epa.gov</u>> **Subject:** RE: responding to OMB's comments on draft proposed rule

Mindy,

Deliberative Process / Ex. 5

Mike

Michael Shapiro

Acting Assistant Administrator, Office of Water

US EPA, 4101M

1200 Pennsylvania Ave., NW

Washington, DC 20460

202-564-5700

From: Eisenberg, Mindy

Sent: Thursday, May 25, 2017 4:49 PM **To:** Shapiro, Mike Shapiro.Mike@epa.gov

Cc: Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Goodin, John

< <u>Goodin.John@epa.gov</u>>; Neugeboren, Steven < <u>Neugeboren.Steven@epa.gov</u>>; Peck,

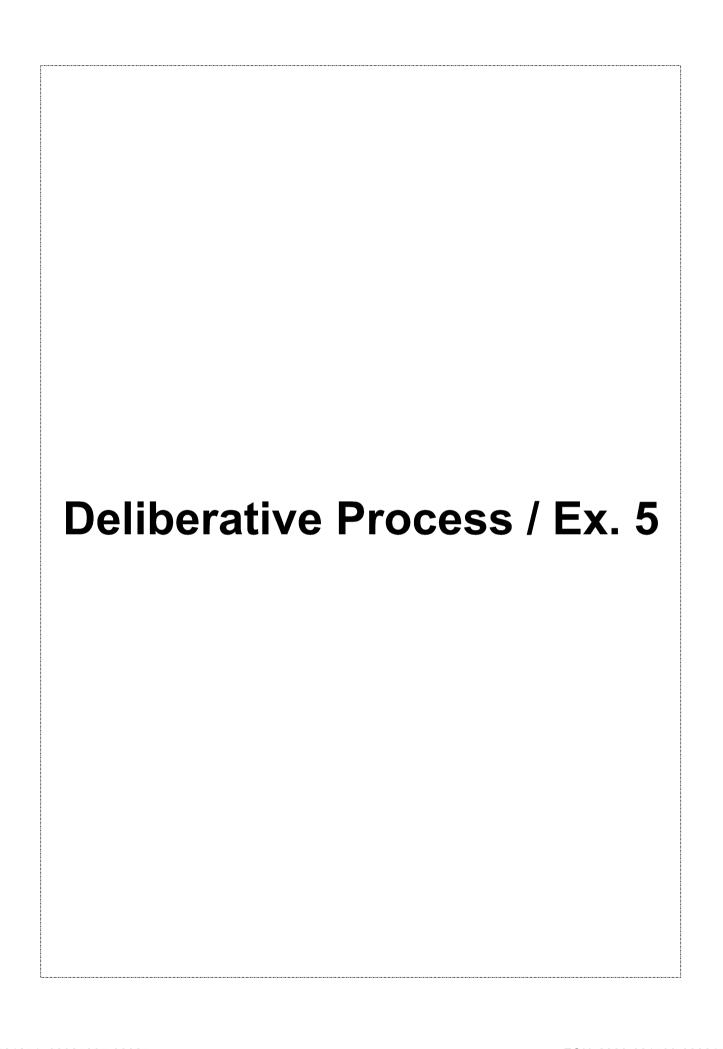
Gregory < Peck. Gregory @epa.gov >; Kwok, Rose < Kwok. Rose @epa.gov >

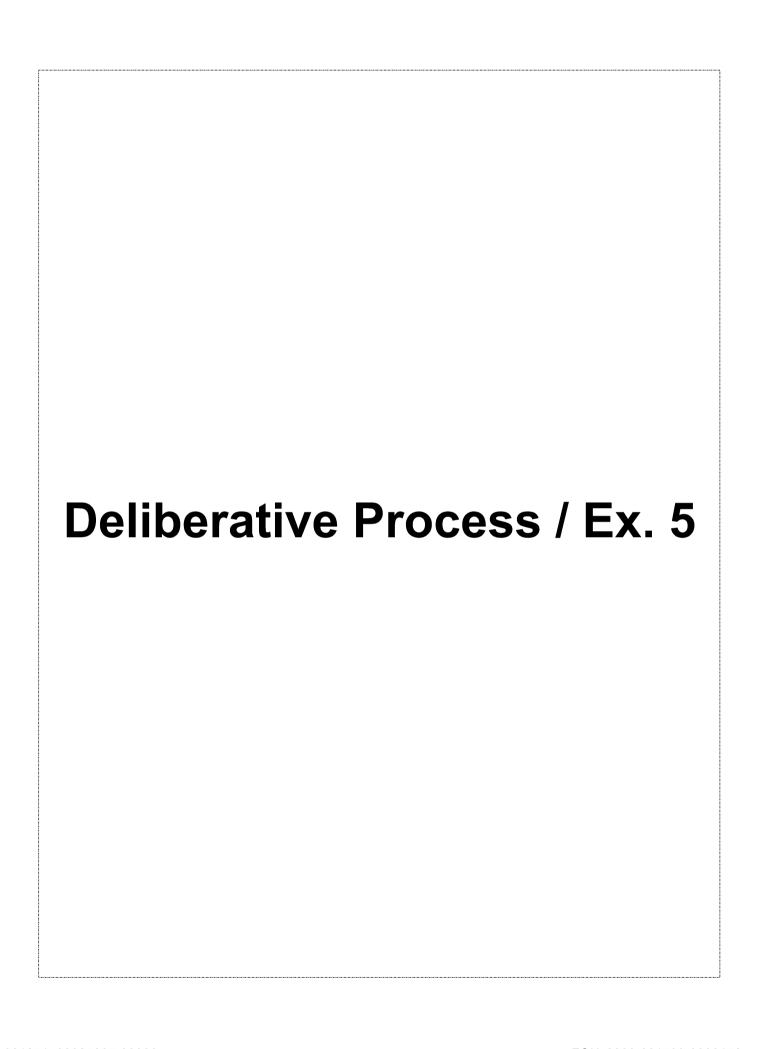
Subject: responding to OMB's comments on draft proposed rule

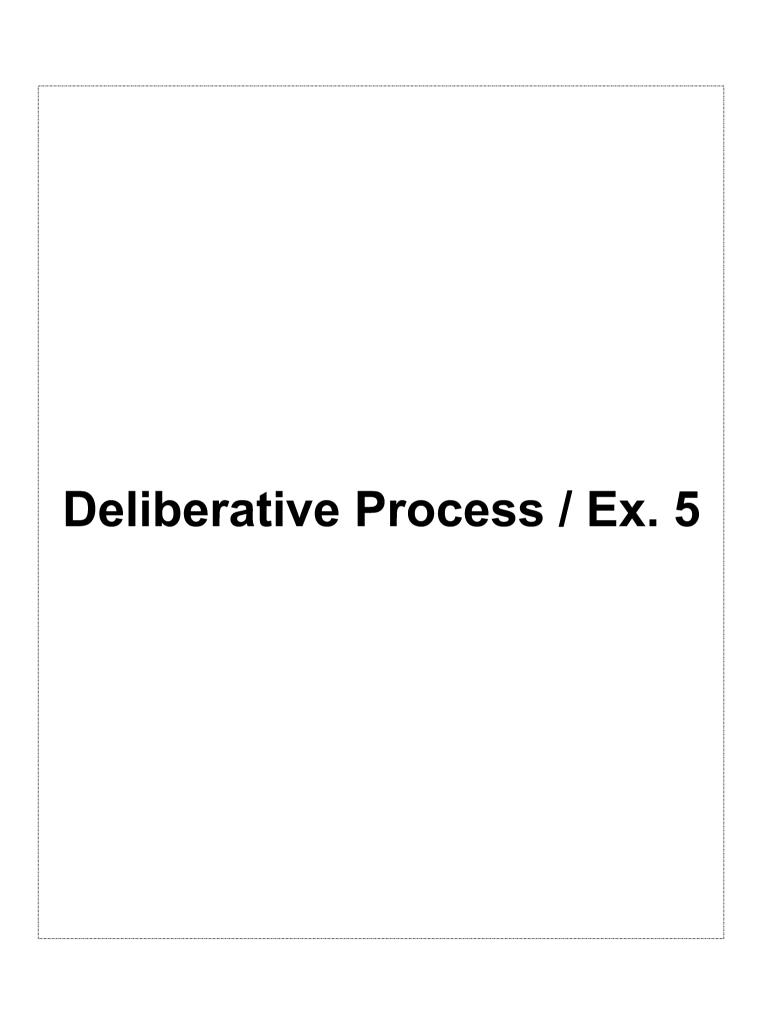
Mike.

EPA/Corps/Army staff have reviewed the interagency comments and have addressed most of those comments (see attached which shows comments and track-changes; Julie H has a few additional edits underway). There are four key issues that we are raising for your attention and for feedback before sharing with senior leadership. We've summarized each outstanding issue, plus our recommended approach to addressing each issue. Please let me know how you would like to proceed in sharing with Sarah and others.

Thanks







Deliberative Process / Ex. 5

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

To: Greenwalt, Sarah[greenwalt.sarah@epa.gov]

Cc: Goodin, John[Goodin.John@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Shapiro,

Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Lousberg, Macara[Lousberg.Macara@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]

From: Eisenberg, Mindy

Sent: Thur 5/4/2017 10:37:59 PM

Subject: draft governors letter draft wotus2 governors letter.docx

Hi Sarah,

Here is a draft letter to send to governors for your review.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Also, we weren't sure who should be a staff contact listed in

the letter – OW, OCIR or both.

Thanks,

Mindy

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

To: Thomas, Latosha[Thomas.Latosha@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]; Spraul, Greg[Spraul.Greg@epa.gov]; Ruf, Christine[Ruf.Christine@epa.gov]; Grevatt,

Peter[Grevatt.Peter@epa.gov]; Wadlington, Christina[Wadlington.Christina@epa.gov]; Gonzalez, Yvonne

V.[Gonzalez.Yvonne@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]; Southerland, Elizabeth[Southerland.Elizabeth@epa.gov]; Christensen, Christina[Christensen.Christina@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Nandi,

Romell[Nandi.Romell@epa.gov]; Havard, James[Havard.James@epa.gov]

Cc: Penman, Crystal[Penman.Crystal@epa.gov]; Evalenko, Sandy[Evalenko.Sandy@epa.gov]

From: Lousberg, Macara

Sent: Wed 5/3/2017 12:03:23 PM

Subject: RE: Agendas for Tomorrow's Agricultural Stakeholders Meeting (9AM)

Revised Agricultural Stakeholders Meeting Agenda (ANNOTATED).docx

Forwarding a slightly revised version of the annotated agenda to reflect that our EO 13777 public listening session already occurred.

From: Thomas, Latosha

Sent: Tuesday, May 02, 2017 4:35 PM

To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Best-Wong, Benita <Best-

Wong.Benita@epa.gov>; Campbell, Ann < Campbell.Ann@epa.gov>; Spraul, Greg

<Spraul.Greg@epa.gov>; Lousberg, Macara <Lousberg.Macara@epa.gov>; Ruf, Christine

<Ruf.Christine@epa.gov>; Grevatt, Peter <Grevatt.Peter@epa.gov>; Wadlington, Christina

<Wadlington.Christina@epa.gov>; Gonzalez, Yvonne V. <Gonzalez.Yvonne@epa.gov>;

Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Farris, Erika D. <Farris.Erika@epa.gov>;

Southerland, Elizabeth <Southerland. Elizabeth@epa.gov>; Christensen, Christina

<Christensen.Christina@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Nandi, Romell

<Nandi.Romell@epa.gov>; Havard, James <Havard.James@epa.gov>

Subject: Agendas for Tomorrow's Agricultural Stakeholders Meeting (9AM)

Hi All,

Here are the two versions of tomorrow's agenda for the agricultural stakeholders meeting. Jim Havard will talk about EPA's plans to approve Ohio's integrated report. Since he has to leave the meeting early, I moved that up as the first topic. Thanks!

Latosha Thomas

U.S. Environmental Protection Agency

Office of Water (On Detail)

(202) 564-0211 (desk)

(202) 568-0851 (cell)

thomas.latosha@epa.gov

To: Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]; Spraul, Greg[Spraul.Greg@epa.gov]; Lousberg, Macara[Lousberg.Macara@epa.gov]; Ruf, Christine[Ruf.Christine@epa.gov]; Grevatt, Peter[Grevatt.Peter@epa.gov]; Wadlington, Christina[Wadlington.Christina@epa.gov]; Gonzalez, Yvonne V.[Gonzalez, Yvonne@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]; Southerland, Elizabeth[Southerland.Elizabeth@epa.gov]; Christensen, Christina[Christensen.Christina@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Nandi, Romell[Nandi.Romell@epa.gov]; Havard, James[Havard.James@epa.gov]

From: Thomas, Latosha

Sent: Tue 5/2/2017 8:34:41 PM

Subject: Agendas for Tomorrow's Agricultural Stakeholders Meeting (9AM)

Agricultural Stakeholders Meeting Agenda (5.3.17).docx Agricultural Stakeholders Meeting Agenda (ANNOTATED).docx

Hi All,

Here are the two versions of tomorrow's agenda for the agricultural stakeholders meeting. Jim Havard will talk about EPA's plans to approve Ohio's integrated report. Since he has to leave the meeting early, I moved that up as the first topic. Thanks!

Latosha Thomas

U.S. Environmental Protection Agency

Office of Water (On Detail)

(202) 564-0211 (desk)

(202) 568-0851 (cell)

thomas.latosha@epa.gov

From: Penman, Crystal

3233 WJCE Call in Nonresponsive Conference Code/ Ex. 6 Location:

Importance: Normal

Subject: Proposed Outreach Strategy for WOTUS Rulemaking **Start Date/Time:** Mon 5/1/2017 2:15:00 PM

End Date/Time: Mon 5/1/2017 3:00:00 PM OW Meeting Request Form outreach.docx

WOTUS2 outreach overview 4-28.docx

Office of Water Meeting Request Form

Date Received in OW:				
OFFICE OF WATER MEETING REQUEST FORM				
FOR: Michael ShapiroX Benita Best-Wong _optional				
Subject: Proposed Outreach Strategy for WOTUS Rulemaking				
Meeting Requested By: Mindy Eisenberg Date:				
Office Director Approval: Date:				
Date Staff will be ready for this meeting by:April 28, 2017				
Latest date meeting can happen by: May 2, 2017				
Time Needed for meeting: 30 Minutes 45 Minutes _X 1 Hour Other				
Purpose of the meeting:				
AA decision expected? Provide AA with information? Yes X No Yes X No				
What specifically is to be decided or presented? Why is a meeting needed? OWOW is seeking feedback from senior leadership on a proposed approach to conducting outreach on the waters of the U.S. rulemaking, including roles for EPA staff and managers. A small group discussion will be more efficient than using the standing Wednesday 10:00 meeting.				
Who will attend the meeting? Mandatory Attendees (Give Full Names as listed in Outlook and Identify Office): OA – Sarah Greenwalt, Liz Bowman OGC - Steve Neugeboren OW – John Goodin, Mindy Eisenberg, Donna Downing, Damaris Christensen, Latosha Thomas				
Optional Attendees (Give Full Names as listed in Outlook and Identify Office – please copy your own office's Special Assistant): OW – Ann Campbell, Macara Lousberg				
 AA/DAA Conference Technology - Please check all that apply: Presentation (e.g., PowerPoint or video file(s) uploaded to computer) Conference Call LineX 				
• VTC [VTC location(s) (i.e., Region and room number) and a VTC contact person(s) must be				
1				

provided to the OW-IO Schedulers no later than **24 hours in advance** of the meeting. If known at the time the meeting request form is submitted, please provide this information below.]

Conference line to use for phone-in atten	dees:
Please use Nonresponsive Conference Code/ Ex.	6
meeting request form. It is recommended that you re appropriate OW manager being briefed, (i.e. Mike o	all line, please request that a conference call number be added to your equest that the OW IO scheduler use the conference call number for the or Benita). If the program office chooses to use different conference call sponsible for opening the conference line with the appropriate PIN
Person Providing Agenda for the Meeting	g:
Name: Mindy Eisenberg	Phone: _202-566-1290
Person Providing Briefing Material (if an	ny) for the Meeting:
Name: Mindy Eisenberg	Phone:202-566-1290

OW principal attending.
 Your office's scheduler or SA will email all electronic copies to Crystal Penman and Ann

Campbell (for Mike Shapiro) or Crystal Edwards and Ann Campbell (for Benita Best-Wong).

All meeting materials are due in BOTH hard copy and electronic copy no later than 3:00 p.m. the day before the meeting, unless the meeting is scheduled too late to allow this. Please provide one hard copy per

- Deliver hard copies to:
 - Crystal Penman: (3219 WJC East) for Mike Shapiro
 - Crystal Edwards: (3223 WJC for) for Benita Best-Wong

WATERS OF THE UNITED STATES Proposed Communications and Outreach Process Overview

Goal: Develop an outreach strategy for the 2-step rulemaking that balances Administration goals and principles with the agencies' resource capabilities in order to maximize opportunities to hear from stakeholders as we develop revised definition of waters of the U.S.:

- Cooperative federalism is a guiding principle prioritize state and tribal input opportunities
- The importance of public participation provide opportunities to hear from other stakeholders
- Importance of moving with deliberate speed when rewriting the Clean Water Rule consistent with the Executive Order.

Key Questions for Consideration:

- Reaction to overall strategy?
- Are there additional groups we should consider meeting with/prioritization?
- What role will senior leaders play at each stage of the outreach during the rulemaking process? Interagency coordination?
- Who should staff coordinate with in AO as we schedule meetings and prepare outreach materials?

FEDERALISM CONSULTATION AND STATE/LOCAL OUTREACH

Federalism: April 10-June 19

0

- Federalism letter signed and sent 4-10-17
- Federalism meeting held 4-19-17
- Federalism comments due 6-19-17
- Read and summarize federalism comments by 7-19-17

Deliberative Process / Ex. 5

Recommended meetings where agencies can listen to issues:

Deliberative Process / Ex. 5

- Series of meetings with Local Government Advisory Committee (LGAC) (preliminary schedule)
 - April 26, 2017 Executive Committee meets to discuss and approve the LGAC's Charge (Protecting America's Waters Workgroup) and develops a work plan with timeline.
 - May 3 LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).
 - May 17- LGAC's Protecting America's Waters Workgroup meets with National Intergovernmental organizations to discuss charge (via teleconference).
 - June 7 LGAC's Protecting America's Waters Workgroup meets to discuss charge (via teleconference).
 - June 28, 2017-The LGAC meets in a public meeting (via teleconference) to review recommendations on rescission of the 2015 CWR and revising the CWR. (Deliverable: Letter of Recommendation) *note* this falls under "outreach" given the timeframe
- Requests of states arising from federalism meeting:
 - How might states modify laws/regs/programs if the scope of federal CWA iurisdiction is reduced?
 - O What will the effects of a Scalia approach be on delegated programs like NPDES? (NACo question)
 - How would you interpret "relatively permanent" and "continuous surface connection?"
- Requests of local governments arising from federalism meeting:
 - How would you interpret "relatively permanent" and "continuous surface connection?"
 - What implementation considerations should the agencies understand?

Outrea	ch: June 20- Step 2 Proposal Deliberative Process / Ex. 5
•	Deliberative Process / Ex. 5
•	

Post-Proposal Outreach: Step 2 Proposal – Final Step 2 Rule (Deliberative Process / Ex. 5

Staffing:

Deliberative Process / Ex. 5

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TRIBAL CONSULTATION AND COORDINATION

Pre-proposal consultation and coordination: April 20-June 20, 2017

- Tribal consultation letter signed and distributed April 20, 2017
- Tribal informational webinars: April 27, 2017 and May 18, 2017
 - Webinar drafted and circulated for review 4-20-17
- In-person meetings:
 - o R9 RTOC, May 3-4, 2017 in San Francisco webinar and in-person meeting
 - o possibly June NCAI meeting in Connecticut following up?

Pre-proposal coordination (still under consideration):

- Deliberative Process / Ex. 5

Impacts analysis:

Deliberative Process / Ex. 5

Staffing:

Deliberative Process / Ex. 5

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GENERAL OUTREACH

We can anticipate a significant number of requests for meetings with EPA throughout the rulemaking process. In order to manage the volume, we may want to consider scheduling inperson meetings and webinars for major stakeholder groups, beginning after close of

federalism/tribal consultation in mid-June.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

- Deliberative Process / Ex. 5
- Staffing

 Output

 Output

 Deliberative Process / Ex. 5

GENERAL COMMUNICATIONS

- Public Facing Outreach Deliberative Process / Ex. 5

 Deliberative Process / Ex. 5
- CMS Deliberative Process / Ex. 5

 O Deliberative Process / Ex. 5

Docket

INTER-AGENCY CONSULTATION Pre-proposal outreach: **Deliberative Process / Ex. 5** Staffing: **Deliberative Process / Ex. 5** Agencies who engaged with CWR: USDA **Deliberative Process / Ex. 5**

FHWA/DOT

NOAA

Deliberative Process / Ex. 5

DOI/FWS

Deliberative Process / Ex. 5

DOE

U.S. Coast Guard

Deliberative Process / Ex. 5

EPA-ARMY/CORPS COORDINATION

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Deliberative Process / Ex. 5

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CONGRESSIONAL COORDINATION

The following process is proposed to facilitate coordination among the agencies and help ensure consistent messaging, synchronized communication and activities, and provide support to cover likely questions raised during meetings.

Requests for Congressional Meetings/Briefings:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Staffing:

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Summary:

Deliberative Process / Ex. 5

Coordination on non-WOTUS2 Congressional Meetings: Deliberative Process / Ex. 5

Agricultural Stakeholders Meeting Sign-In Sheet

May 3, 2017

9-10AM

Nonresponsive Conference Code/ Ex. 6

- EPA's Plans to Approve Ohio's Integrated Report
- Budget
- EO 13777
- WOTUS/CWR

To: Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov];

Goodin, John[Goodin.John@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]; Lousberg,

Macara[Lousberg.Macara@epa.gov]

Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Thomas,

Latosha[Thomas.Latosha@epa.gov]

From: Eisenberg, Mindy

Sent: Thur 4/27/2017 10:19:46 PM

Subject: draft outreach strategy for Monday discussion

WOTUS2 outreach overview 4-27.docx

Hi All,

	aft outreach strategy that we could talk through. As you
will see, we are attempting to [Deliberative Process / Ex. 5
Deliberative Process / Ex. 5	We would appreciate any comments on the
overall approach, recommendations, ques	stions for S and L, etc. before sending this forward
tomorrow afternoon.	-

Thanks!

Mindy

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

To: Minoli, Kevin[Minoli.Kevin@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Greenwalt, Sarah[greenwalt.sarah@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Eisenberg,

Mindy[Eisenberg.Mindy@epa.gov]

Cc: Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]

From: Wendelowski, Karyn
Sent: Thur 4/27/2017 6:01:10 PM

Subject: CWR Supreme Court litigation - incoming briefs

16-299 ts NAM.PDF

16-299bs.pdf

16-299 bs Ohio et al supporting petitioner.pdf

16-299 Respondents' Brief in Support of Petitioner.pdf

Attached please find the incoming briefs from the National Association of Manufacturers and supporters, including a group of States, arguing that challenges to a rule defining the "waters of the United States" do not belong in one Court of Appeals within 120 days of promulgation under Section 509 of the CWA, but rather belong in the district courts where challenges can be brought for 6 years from the date of promulgation.

The U.S. brief in response is currently due May 31st Attorney Work Product / attorney client/DPP Ex. 5

Attorney Work Product / attorney client/DPP Ex. 5

Please let me know if you have any questions.

Karyn

Karyn Wendelowski

Attorney-Advisor

Water Law Office

Office of General Counsel

(202)564-5493

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov] From: Christensen, Damaris Sent: Wed 4/26/2017 8:01:38 PM Subject: LGAC charge
Hi all,
Generally I think the LGAC letter looks good and the charges Deliberative Process / Ex. 5 Deliberative Process / Ex. 5
Deliberative Process / Ex. 5
Daamris
Damaris

From: Eisenberg, Mindy

Sent: Tuesday, April 25, 2017 7:53 PM

To: Christensen, Damaris < Christensen. Damaris@epa.gov>; Kwok, Rose

<Kwok.Rose@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Best-Wong,

Benita <Best-Wong.Benita@epa.gov> **Subject:** Fwd: Email note to Goodin

Deliberative Process / Ex. 5

Sent from my iPhone

Begin forwarded message:

From: "Bowles, Jack" < Bowles.Jack@epa.gov>

Date: April 25, 2017 at 7:27:02 PM EDT **To:** "Goodin, John" < Goodin.John@epa.gov>

Cc: "Eisenberg, Mindy" < <u>Eisenberg.Mindy@epa.gov</u>>, "Downing, Donna" < <u>Downing.Donna@epa.gov</u>>, "Eargle, Frances" < <u>Eargle.Frances@epa.gov</u>>

Subject: FW: Email note to Goodin

Hey John,

The LGAC's Protecting America's Waters Workgroup is meeting on Wednesday, May 3rd, 4:30-5:30 ET via teleconference. We would like you to speak to them regarding Waters of

the U.S. E.O.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Best,

Jack

To: Shapiro, Mike[Shapiro.Mike@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Penman, Crystal[Penman.Crystal@epa.gov]; Campbell, Ann[Campbell.Ann@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]; Gonzalez, Yvonne V.[Gonzalez.Yvonne@epa.gov]; Nandi, Romell[Nandi.Romell@epa.gov]; Christensen, Christina[Christensen.Christina@epa.gov]; Spraul, Greg[Spraul.Greg@epa.gov]; Lousberg, Macara[Lousberg.Macara@epa.gov]; Ruf, Christine[Ruf.Christine@epa.gov]; Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Grevatt, Peter[Grevatt.Peter@epa.gov]; Southerland, Elizabeth[Southerland.Elizabeth@epa.gov]; Goodin, John[Goodin.John@epa.gov]

From: Thomas, Latosha

Sent: Wed 4/26/2017 1:57:24 PM

Subject: State Associations Stakeholder Meeting Agendas (1- 3PM)
State Associations Stakeholder Meeting Agenda (ANNOTATED).docx
State Associations Stakeholder Meeting Agenda.docx

Hi All,

Here are the two versions of the agenda for today's meeting. Thanks!

Latosha Thomas

U.S. Environmental Protection Agency

Office of Water (On Detail)

(202) 564-0211 (desk)

(202) 568-0851 (cell)

thomas.latosha@epa.gov

No. 16-299 In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS, Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE RESPONDENTS OHIO, ALABAMA,
ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA,
GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY,
LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO
STATE ENGINEER, THE NEW MEXICO ENVIRONMENT
DEPARTMENT, NORTH DAKOTA, OKLAHOMA, SOUTH
CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH,
WEST VIRGINIA, WISCONSIN, AND WYOMING
IN SUPPORT OF PETITIONER

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
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30 East Broad St., 17th Floor
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ohioattorneygeneral.gov
Counsel for Respondent
State of Ohio

QUESTION PRESENTED

Does the federal rule redefining the "waters of the United States" that are subject to the Clean Water Act fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. § 1369(b)(1)?

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(June 29, 2015)
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INTRODUCTION

The federal government seeks to resuscitate the long-repudiated style of interpretation under which "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its ma kers." Holy Trinity Church v. United States , 143 U.S. 457 , 459 The Environmental Protection Agency (1892).("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") make arg uments that are the flipside of *Holy Trinity*. In June 2015, they issued a rule purporting to establish an expansive new definitio n of "waters of the United States" for the Clean Water Act. See Clean Water Rule: Defin ition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). They argue that 33 U.S.C. § 1369(b)(1) grants circuit jurisdiction over challenges to this Rule because—while the Rule does not fall "within the letter" of § 1369(b)(1)—it falls within that provision's efficie nev-based animating "spirit." See Holy Trinity, 143 U.S. at 459.

The Agencies' purpose-over-text approach to statutory interpretation suffers from two main problems. First, "Holy Trinity is a decision that the Supreme Court stopped relying on more than two decades ago." A ntonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 12 (2012). Nowadays, this Court follows a rule guite different from the one propounded by Holy Trinity in 1892 and suggested by the Agencies today—namely, that courts generally "presume Congress says what it means and means what it says." Simmons v. Hi mmelreich, 136 S. Ct. 1843, 1848 (2016). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Conn. Nat'l Bank v. Germain , 503 U.S. 249, 254 (1992) (citation omitted). The Court's plain-text approach resolves this case.

The Agencies argue that Subsections (E) and (F) of § 1369(b)(1) are broad enough to reach the Rule. Subsection (E) covers EPA action "approving or promulgating any effluent limitation or other limit ation under section 1311, 1312, 1316, or 1345"; Subsection (F) covers EPA action "issuing or denying any permit under section 1342." (Unless otherwise indicated, section citations are to Title 33 of the U.S. Code.) The Agencies are wrong. As a matter of pure text, the controlling concurrence below called their interpretation "illogical and unreasonable," Pet. App. 29a (Griffin, J., concurring in judgment), and even the lead opinion described their interpretation as "not compelling," *id.* at 9a (McKeague, J., op.).

Starting with Subsection (E), the R ule does not "promulgat[e]" an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." Those four sections direct the EPA to issue distinct types of pollution restrictions: technology-based restrictions (§ 1311), water -quality restrictions (§ 1312), new source restrictions (§ 1316), or sewage -sludge r estrictions (§ 1345). The Rule, by contrast, gates a definition, not a limitation. It even notes that it "does not establish any regulatory requir ments." 80 Fed. Reg. at 37,054. Further, the Rule was not issued *under* the four listed sections. It instead defines statutory text ("waters of the Uni ted States") found only in a definitional sec tion (§ 1362(7)) under, if anything, the Agencies' general rulemaking authority (e.g., § 1361(a)).

Turning to Subsection (F), the Rule does not issue or deny a pollution—discharging permit under the permitting program established by § 1342. The Agencies instead interpret Subsection (F) far more broadly to cover anything affecting § 1342's permitting process. Their interpretation reads the "issuing or denying" verbs right out of the statute. As this Court has already explained to the EPA, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting una mbiguous statutory terms." Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014).

Second, even under a purpose -based approach, the Agencies 'argument—that circuit jurisdiction here promotes § 1369(b)(1)'s alleged efficiency purpose—overlooks that "no legislation pur sues its purposes at all costs." Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). "[A]nd it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Id. at 526. This case proves that point. Other important purposes could have motivated Congress—to draft the specific language in § 1369(b)(1) that excludes the Rule.

For one thing, the Agencies' reading muddies a relatively stra ightforward jurisdictional statute, despite Congress's desire for a "clear and orderly process for judicial review." See H.R. Rep. No. 92-911, at 136 (1972). This Court has long presumed that Congress intends for jurisdictional statutes to yield "simple" rules. Hertz Corp. v. Friend, 559 U.S. 77, 80, 94 (2010). Vague rules ensure that "an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much

better spent upon elucidating the me rits of cases." Sisson v. Ruby, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (cita tion omitted). This lit igation spotlights those hazards. "[C]areful counsel" have had to sue simultaneously at two levels of the judiciary "to protect their rights," Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys. , 551 F.2d 1270, 1280 (D.C. Cir. 1977), and many courts have spent significant resources to "as sure them selves of their power to hear" these suits, Hertz, 559 U.S. at 94. The Agencies' amorphous reading of Subsections (E) and (F) would cement this wasteful double litigation. Parties and courts would routinely find it difficult to determine whether a particular regulation has an "indirect consequence" of initiating limitations found elsewhere in the Act (so as to trigger Subsection (E)), or whether the regulation sufficiently "impact [s] permitting requirements" (so as to trigger Subsection (F)). Pet. App. 10a, 18a (McKeague, J., op.). Far better that courts stick to the comparatively simpler rules flowing out of § 1369(b)(1)'s text.

For another thing, the Agencies' interpretation could restrict the judicial review available in asapplied challenges. This Court has long presumed that Congress i ntends for final agency action to be judicially reviewable under the Administrative Procedure Act. See U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1816 (2016) . But § 1369(b)(2) bars judicial review over actions that fall within § 1369(b)(1)'s purview in any later "civil or criminal proceeding for enforcement." Given this restriction, other courts have refused to "read[] § [1369](b)(1) broadly." Am. Paper Inst., Inc. v. EPA, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.). They instead have presumed that Congress did not intend for

§ 1369(b)(2)'s "peculiar sting" to apply to actions not plainly covered by § 1369(b)(1)'s terms. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

At day's end, § 1369(b)(1)'s text resolves this case, and the Court should reject the Agencies' policy-driven reasons for departing from that text.

STATEMENT OF THE CASE

A. The Act's Regulatory Scheme

The Clean Water Act prohibits any unauthorized "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Act defines "pollutant" to include many ord inary substances, including dirt and fill materials. *Id.* § 1362(6). It defines "discharge of a pollutant" to cover "any addition of any pollutant to navigable waters from any point source," such as a pipe or ditch. *Id.* § 1362(12), (14). And it defines "person" to include individuals, corporations, and States. *Id.* § 1362(5).

As an exception to § 1311(a)'s ban on discharges, the Act establishes two permitting programs that implicate the jurisdictional question before the Court. Under § 1342(a), the EPA administers the "National Pollutant Discharge Elimination System" ("NPDES"), and issues permits allowing persons to discharge pollutants that can wash downstream. Under § 1344, the Corps issues permits allowing persons to discharge "dredged or fill material," "which. unlike traditional water pollutants, are solids that do not readily wash down stream." Rapanos v. United States, 547 U.S. 715, 723 (2006) (plurality op.). Both § 1342 and § 1344 authorize States to o perate their own permitting programs for wa ters within their

borders. 33 U.S.C. §§ 1342(b), 1344(g). Most States have done so under the NPDES program in § 1342; two States have done so under the program for dredged or fill material in § 1344.

A permit holder seeking to discharge pollutants must abide by the limitations that are established under other statutory sections . *Id.* § 1342(a). Many of these specific sections (and a few others) also implicate the jurisdictional question presented here.

Technology Limits (§ 1311). "[C]aptioned 'effluent limitations," E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112, 118 (1977), § 1311 directs the EPA to establish technology-based "effluent limit ations" for *existing* point sources. These limit ations were established in "two stages." *Id.* at 121. Early limits were tied to the "best practicable control tec hnology" for point sources or to more stringent state or water-quality standards. 33 U.S.C. § 1311(b)(1)(A), (C). Later effluent limitations were tied to the "best available technolog v economically achievable" (for toxic pollutants) or the "best conventional pollutant control technology" (for conventional pollutants). Id. § 1311(b)(2)(A), (E); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 220-21 (2009). These limits are incorpora ted into specific permits § 1342(a), which "serve 'to transform generally appl icable effluent limitations . . . into the oblig ations . . . of the individual discharger(s)." $E.I.\ du\ Pont$, 430 U.S. at 119-20 (citation omitted). For some effluent limitations, however, § 1311(c) allows a point source to seek a variance based on individual need.

Water-Quality Limits (§ 1312). Section 1312 directs the EPA to set more stringent "[w]ater quality related effluent limitations" for specific water bodies.

The EPA may do so if it determines that § 1311(b)(2)'s technology-based limitations would be inadequate to protect public health, water su pplies, and certain uses. See 33 U.S.C. § 1312(a).

New-Source Limits (§ 1316). Section 1316 directs the EPA to set "[n]ational standards of performance" for "new sources." These new sources must follow a distinct technology-based standard—the "best available demonstrated control technology" at the time that construction begins on the new source. Id. § 1316(a)(1)-(2). A State also may enforce new-source standards within its borders if approved to do so by the EPA. Id. § 1316(c).

Limits on Toxic Pollutants (§ 1317) & Sewage Sludge (§ 1345). Outside this overarching structure, some pollutants receive specific treatment. Se ction 1317 directs the EPA to establish a list of, and potentially set more restrictive "effluent standards" for, certain "toxic pollutants." *Id.* § 1317(a). In addition, Section 1345, as amended in 1987, directs the EPA to set either "numerical limitations" on certain toxic pollutants found in "sewage sludge", or "[a]Iternative standards" for publicly owned treatment works if those numerical limits are infeasible. *Id.* § 1345(d)(2)-(3); see Pub. L. No. 100-4, § 406, 101 Stat. 71-72.

State Water -Quality Standards (§ 1313). Before the Clean Water Act, federal law directed each State to set "water quality standards" for interstate waters "flowing through" the State's borders. *E.g.*, S. Rep. 92-414, at 2 (1971). Section 1313 continues that practice. It directs State s to issue and periodically update water -quality standards, and to adopt "total maximum daily loads" for water bodies that cannot

meet th ose standards through § 1311's technology-based limitations alone. 33 U.S.C. § 1313 (a), (c)-(d). "These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limit ations, may be further regulated to prevent water quality from fal ling below acceptable levels." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (c itation omitted). As part of these standards, States must adopt "individual control strateg[ies]" for "toxic pollutants." 33 U.S.C. § 1314(l)(1)(D). If the EPA rejects a State's individual control strategy, the EPA may promulgate its own for the relevant waters. *Id.* § 1314(l)(3).

B. The "Waters Of The United States" Rule

The phrase "navigable waters" identifies the waters that are covered by "the entire statute," and so its meaning delineates the reach of the Act's sections. Rapanos, 547 U.S. at 742 (plurality op.). The Act 's definitional section defines "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Corps originally interpreted the phrase "waters of the United States" under the "traditional judicial definition," which covered only "interstate waters that are 'navigable in fact' or readily susce—ptible of being rendered so." Rapanos, 547 U.S. at 723 (plurality op.). Environmental groups cha—llenged that definition, however, and a district court invalidated it as too narrow. Nat. Res. Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975). Since then, the Agencies have "adopted a far broader definition." Rapanos, 547 U.S. at 724 (plurality op.). This Court has rejected their overly broad definition

as applied to certain wetlands, see id. at 786-87 (Kennedy, J., concurring in judgment), and to an "abandoned sand and gravel pit... which provide[d] habitat for migratory birds," Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001) ("SWANCC").

The Rule is another attempt by the Agencies to define "waters of the United States" too broa dly; if implemented, it would "invariably result[] in expansion of [their] regulatory authority." Pet. App. 15a (McKeague, J., op.). The Rule is unlawful in many respects, including because it extends the Agencies' regulatory authority to many lands that the Act does not cover under this Court's teachings, and because it adopts specific distance—based standards without any record support or public notice. The States have thus obtained a nationwide stay and a preliminary injunction against its implementation. See In re EPA, 803 F.3d 804, 807-09 (6th Cir. 2015); North Dakota v. EPA, 127 F. Supp. 3d 1047, 1056-58, 1060 (D.N.D. 2015).

More important for present purposes, the Rule purports *only* to define the waters that are subject to federal regulation under the Act. "In this joint rule-making," the Rule indicates, "the agencies establish a definitional rule that clarifies the scope of the Clean Water Act." 80 Fed. Reg. at 37,104. The Rule does not change any of the Act's mechanisms, set any standards or limitations, exempt or include any sources or pollutants, or issue or deny any permits. The Rule notes that it "does not establish any regulatory requirements," *id.* at 37,054, and "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain

regulatory requirements that might significantly or uniquely affect small governments," *id.* at 37,102.

C. Judicial Review Under The Act

Seeking to "establish a clear and orderly process for judicial review," H.R. Rep. No. 92-911, at 136 (1972), the Clean Water Act divides jurisdiction between the circuit courts and the district courts based on the type of EPA action that is at i ssue. For most final EPA or Corps actions, challengers may sue in the district court under the Administrat ive Proc edure Act (APA). See 5 U.S.C. § 704. In this Court's recent cases, for example, the plaintiffs who asserted were not "waters of the United that their lands States" sued in district court under the APA. U.S. Army Corps of Eng'rs v. Hawkes C o., 136 S. Ct. 1807, 1813 (2016); Sackett v. EPA, 566 U.S. 120, 125 (2012); Rapanos, 547 U.S. at 765 (Kennedy, J., co ncurring in judgment); SWANCC, 531 U.S. at 165.

The Act also identifies seven specific actions by the EPA's Administrator that are subject to immediate circuit review. 33 U.S.C. § 1369(b)(1). In particular, it requires circuit review for EPA action:

- (A) in promulgating any standard of performance under section 1316 of this title,
- (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
- (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
- (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,

- (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
- (F) in issuing or denying any permit under section 1342 of this title, and
- (G) in promulgating any individual control strategy under section 1314(l) of this title[.]
- Id. These petitions for review must be filed "within 120 days from the date of such determination, a proval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." Id. If a party could have sought review under § 1369(b)(1), that party cannot later assert the challenge in enforcement proceedings. Id. § 1369(b)(2).

D. State Challenges To The Rule

The State Respondents believe that circuit co urts lack jurisdiction over the Rule under § 1369(b)(1) because the Rule does not fall within one of the seven listed actions. So they filed district -court suits challenging the Rule. North Dakota v. EPA, No. 3:15 -cv-59 (D.N.D.); Ohio v. U.S. Army Corps of Eng'rs, 2:15-cv-2467 (S.D. Ohio); Texas v. EPA, No. 3:15 -cv-162 (S.D. Tex.); Georgia v. McCarthy, No. 2:15-cv-79 (S.D. Ga.); Oklahoma ex rel. Pruitt v. EPA, No. 4:15 -cv-381 (N.D. Okla.).

Yet, given the Agencies' suggestion that the Rule fell within § 1369(b)(1)'s exclusive jurisdictional grant, see 80 Fed. Reg. at 37,104, the State Respondents filed protective petitions for review in the circuit courts. E.g., Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys., 551 F.2d 1270, 1280 (D.C. Cir. 1977); see Ohio v. U.S. Army Corps of Eng'rs , No. 15 -3799

(6th Cir.); Oklahoma ex rel. Pruitt v. EPA , No. 15 - 9551 (10th Cir.); North Dakota v. EPA , No. 15 - 2552 (8th Cir.); Texas v. EPA , No. 15 - 60492 (5th Cir.); Georgia v. McCarthy , No. 15 - 13252 (11th Cir.). Those petitions were consolidated in the Sixth Circuit with the petitions from many other groups. 28 U.S.C. § 2112(a).

After consolidation, the States filed motions to dismiss the petitions for lack of jurisdiction. The Sixth Circuit denied the motions in a fractured 1-1-1 decision. Pet. App. 4a (McKeague, J., op.); *id.* at 27a (Griffin, J., concurring in judgment).

The lead opinion, written by Judge McKeague, concluded that the circuit courts had jurisdiction under Subsections (E) and (F) of § 1369(b)(1). Pet. App. 3a-26a. Relying primarily on cases interpreting § 1369(b)(1) rather than the statute's text, Judge McKeague noted that the section had been strued not in a strict literal sense, but in a ma nner designed to further Congress's ev ident p urposes." Pet. App. 26a. Under this pragmatic approach, the lead opinion agreed with the Agencies that Subse tion (E) could extend to re gulations, like the Rule, that had an "indirect consequence" of triggering lim itations found elsewhere in the Act. Id. at 10a. And the lead opinion agreed that Subsection (F) could cover regulations, like the Rule, that "impact permi tting requirements." Id. at 18a.

Judge Griffin concurred in the judgment. Pet. App. 27a-45a. The concurrence disagreed that the Sixth Circuit had jurisdiction under the text of Su bsections (E) and (F), finding the Agencies' rea ding to be "illogical and unreasonable." *Id.* at 29a. Neve rtheless, the concurrence believed that the pa nel was

compelled to follow "incorrect" circuit preceden t applying Subsection (F). *Id.* at 44a (discussing *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009)). "Absent *National Cotton*," the concurrence would have "dismiss[ed] the petitions for lack of jurisdiction." *Id.* at 45a.

Judge Keith dis sented. Pet. App. 45a -47a. The dissent agreed with the concurrence's reading of Subsections (E) and (F). *Id.* at 45a. But the dissent did not read *National Cotton* as compelling a finding of jurisdiction under Subsection (F). *Id.* at 45a-47a.

The Sixth Circuit denied en banc review. *Id.* at 52a. It has since stayed briefing on the merits.

SUMMARY OF ARGUMENT

A. The plain text of Subsections (E) and (F) shows that circuit courts lack juri sdiction over the Rule under § 1369(b)(1).

Subsection (E). Subsection (E) covers EPA a ction "approving or promulgating any effluent limit or other limitation under section 1311, 1312, 1316, or 1345." This text has three elements. Its verb choices extend to EPA action s that "approv[e]" something adopted by another or that "promulgat[e]" something adopted by the EPA itself. In addition, the thing being approved or promulgated must be an "effluent limitation or other limitation." The Act defines "effluent limitation" to cover certain restrictions on discharges into navigable wa ters. The Act does not define "other limitation." That phrase is best read as covering restrictions that are similar to an effluent limitation, but that fall outside its technical defini-Finally, the EPA must issue the limitation tion.

"under"—i.e., according to the authority of—four specific sections, § 1311, 1312, 1316, or 1345.

For two reasons, this text does not reach the Rule. First, the Rule does not "promulgate" an "effluent limitation or other limitation." It does not issue any restrictions on regulated parties, and instead defines the scope of the phrase "waters of the United States." Second, the Agencies did not issue the Rule pursuant to congressional instructions found within the four listed sections; instead, they defined a phrase used only in the definitional section (§ 1362) under, if anything, their general rulemaking authority.

In response, the Agencies argue that Subsection (E)'s text is broad enough to cover regulations, like the Rule, that have a "practical effect" of triggering limitations found *elsewhere* in the Act, such as § 1311(a)'s general ban on discharges into navigable waters. Both text and precedent disprove this interpretation.

As for text, Subsection (E)'s entire clause shows that the thing that the EPA "promulgates" itself must be the limitation. Other s ections confirm this reading because they treat "effluent limitation s or other limitations" as thing s that themselves can be violated. E.g., 33 U.S.C. § 1341(a)(4). And the Agencies' argument lacks a logical stopping point. For example, Sackett v. EPA, 566 U.S. 120 (2012), considered an EPA action finding specific lands to be "w atters of the United States." Sackett started in the district court under the APA—even though the agency action had a "practical effect" of trigger ing the Act's limits. Finally, the Agencies mistakenly ar gue that the Rule issued "under section 1311" within the meaning of Subsection (E) merely because they ref-

erenced that section in the portion of the Rule that identifies the "I egal authority" to adopt it. Yet that portion of the Rule identifies the *entire* Act as providing the Agencies with such authority, and the y should not be able to manufacture jurisdiction mer ely by mentioning a section listed in Subsection (E).

As for precedent, the Agencies argue that *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977), supports their "practical" construction of Subsection (E). But *E.I. du Pont* does not, as the lead opinion below asserted, justify "eschew[ing]" a "literal reading" of Subsection (E). *E.I. du Pont*, in fact, *adopted* a literal reading by rejecting an atextually narrow view that would have limited "under section 1311" to EPA variances issued under § 1311(c). While *E.I. du Pont* also relied on practical concerns, it did so only to reinforce the plain text.

Subsection (F). Subsection (F) covers EPA action "issuing or denying any permit under section 1342." This section has two elements. The EPA must "i ssue" (grant) or "deny" (refuse access to) "any permit." The issuance or denial must also be "under" (i.e., according to the authority of) § 1342. In this way, the Act splits judicial review for permitting decisions: It authorizes circuit review for EPA permits under the NPDES program in § 1342, and district review for Corps permits for dredged or fill material in § 1344.

Here, the Rule neither issues a permit nor d enies one under § 1342. That fact ends the analysis under Subsection (F)'s unambiguous text.

In response, the Agencies argue that Subsection (F) covers all EPA actions that "impact" or "affect" permitting. But the Agencies offer *no* textual hook

for this interpretation, which reads "issuing or denying" out of the subsection. And the holding of *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) — that an EPA veto of a state-issued permit qualifies as a denial of that permit —comports with the plain text. Under the word's ordinary meaning, "de ny" means "to refuse the use of or access to." That is precisely what the EPA veto accomplished. And while *Crown Simpson* also referenced practical concerns, the Court again did so merely to reinforce, not repudiate, the text.

B. The plain language of Subsections (E) and (F) alone decide s this case. Nonetheless, r eading § 1369(b)(1) as a whole confirms that the Rule is not subject to immediate circuit review . Section 1369(b)(1) establishes circuit review for seven *specific* EPA actions, down to the subsection under which some a ctions are authorized. This precision should make the Court wary of adopting a loose "practical" construction of § 1369(b)(1). A comparison of that provision to its counterpart in the Clean Air Act illustrates why. The Clean Air Act grants circuit jurisdiction over "any" final EPA action, showing that Congress knows how to provide for broad circuit review when it wants to.

Yet the Agencies' broad reading of Subsections (E) and (F) would permit circuit review over a ctions that Congress excluded from § 1369(b)(1). Take their reading that "under section 1311" in Subsection (E) covers regulations implicating anything mentioned in that section (such as "navigable waters"). Section 1311 cross-references many provisions, including, for example, state water -quality standards in § 1313. But the Agencies agree that their sections is reference does not

allow review over those state standards. Similarly, the Agencies' "affect-permitting" test for Subsection (F) could sweep in Corps permitting rules under § 1344 (as it has in this case), even though § 1369(b)(1) references only § 1342 permits.

In addition, the Agencies' broad reading of § 1369(b)(1) creates superfluous text. A broad view of "under section 1311" in Subsection (E) would re nder that subsection's reference to other sections (such as § 1312) s uperfluous. After all, § 1311 cross references § 1312 too. And the Agencies' "affectspermitting" test for Subsection (F) would sweep in regulations issued under §§ 1311, 1312, 1316, 1317, into that s ubsection—because 1318, and 1343 § 1342(a) requires permits to adhere to those sections. That result would conflict with Congress's decision to grant jurisdiction over some, but not all, of those sections in § 1369(b)(1).

- C. Lastly, a plain -text reading comports with well-established interpretative presumptions.
- 1. This Court has held that j urisdictional st atutes should set clear rules. The plain-text reading advances this goal; the Agencies' pragmatic view does not. Subsection (E)'s text covers specific EPA-sanctioned restrictions referenced in (and issued a coording to) four sections. But the Agencies' "indirect-effects" test requires a n amorphous inquiry into a regulation's impact. Likewise, Subsection (F)'s text establishes a clear rule—the EPA must issue or deny a permit. But the Agencies' "affects-permitting" test creates an unworkable one.
- 2. This Court interprets statutes against a background presumption favoring judicial review of agen-

cy action. Both *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), and *Sackett* relied on that presumption to reject the Agencies' a rgument that challenges to particular actions were premature. The presumption applies here, too, because of § 1369(b)(2)'s limits on judicial review. Indeed, other courts have read § 1369(b)(1) narrowly because, where it applies, § 1369(b)(2) restricts subsequent challenges in later enforcement proceedings. Related constitutional concerns with § 1369(b)(2)'s restrictions reinforce this interpretation.

3. The Agencies' competing presumption, by contrast, has little basis in this Court's precedent. They argue that Florida Power & Light Co. v. Lor ion, 470 U.S. 729 (1985), created a broad preference favo ring immediate circuit review over agency action. Yet Florida Power nowhere suggests it establishes such a universal efficiency-based rule. It simply resolved the ambiguous text of one law. Section 1369(b)(1), by contrast, unambiguously bars appellate jurisdiction here. Besides, this Court's presumption in favor of judicial review of agency action "repudiates" such efficiency concerns—as Sackett made clear.

ARGUMENT

CIRCUIT COURTS LACK SUBJECT-MATTER JURISDICTION OVER THE RULE UNDER § 1369(b)(1)

The Agencies assert that the Rule falls within Subsections (E) and (F) of § 1369(b)(1). Basic principles of statutory interpretation, however, show that neither subsection covers the Rule. Most notably, the Rule falls outside the text of those subsections. When read as a whole, moreover, § 1369(b)(1) reiterates that Subsections (E) and (F) cannot be given the

breadth ne eded to cover the Rule. Finally, t wo of this Court's working presumptions—those presuming that Congress intends for bright—line jurisdictional rules and for judicial review over agency action s—confirm the plain-text reading.

A. The Plain Text Of Subsections (E) And (F) Does Not Reach The Rule

As the Court has said time and again, a statutory-interpretation question "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end" when the at language is unambiguous. *Puerto Rico v. Franklin Cal. Tax*—*-Free Trust*, 136 S. Ct. 1938, 1946—(2016) (citation omitted). The Court, in other words, "presume[s] Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

This "Supremacy -Of-Text Principle" decides this case. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012). Under no reasonable reading could the language in Subsections (E) and (F) extend to the Rule. Indeed, a majority of the Sixth Circuit panel has already concluded that the Agencies' reading of these subsections is both "illogical and unre asonable." Pet. App. 29a (Griffin, J., concurring in judgment); see id. at 45a (Keith, J., dissenting).

1. The Rule falls outside Subsection (E) because it is not a "limitation" issued under the identified sections

a. Subsection (E) grants jurisdiction to the circuit courts over EPA action (1) "approving or promulga ting" (2) "any effluent limitation or other limit ation"

(3) "under section 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). This text has three elements.

First, the verbs cover EPA actions that adopt restrictions developed by others ("approving"), and EPA actions that issue restrictions developed by the agency itself ("promulgating"). Cf. Webster's New World Dictionary 68, 1137 (2d college ed. 1972). The use of both verbs, moreover, shows that the verb "promulgate" has a specific meaning, covering regulations that directly impose limitations rather than "everything [the EPA] issues" in the Federal Register. Roll Coater, Inc. v. Reil ly, 932 F.2d 668, 670 -71 (7th Cir. 1991) (Easterbrook, J.). Any broader reading of "promulgating" would render "approving" in the subsection superfluous. Id.

Second, the thing that the EPA approves or promulgates must be an "effluent limitation or other limitation." The Act defines "effluent limitation" as "any restriction established by a State or the on quantities, rates, and concentrations of chemical, physical, biological, and other *constituents* which are discharged from point sources into navi gable w aters " 33 U.S.C. § 1362(11) (emphases added). Thus, an effluent limitation must restrict discharges into navigable waters from point sources. See id. § 1362(14); Rapanos v. United States , 547 U.S. 715, 743-44 (2006) (plurality op.). These "effluent limit ations" include EPA regulations that establish general restrictions on discharge s by categories of point sources, such as chemical plants. See E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112, 136 (1977). The EPA regularly adopts or amends those effluent limitations. See Defenders of Wildlife v. Perciasepe.

714 F.3d 1317 , 1320 -21 (D.C. Cir. 2013) ; 33 U.S.C. § 1311(d).

The Act does not, by contrast, define the phrase "other limitation." The word "limitation" is commonly (if unhel pfully) defined as "something that Ii mits"—that is, something that "restrict [s]" or "curb [s]" action. See Webster's, supra, at 820 (defining "limitation" and "limit"). Yet Congress's use of the phrase "effluent limitation or other limitation" suggests that an "other limitation" must be similar in kind to an effluent limitation. Under "the doctrine of noscitur a sociis," courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995). A broad view of "other limitation"—as covering anything that r estricts anyone—would swallow up the phrase "effluent limitation." If Congress had intended for Subsection (E) to reach any limitation, it would have said "any limitation."

When r ead in context, therefore, "other limit ation" should cover EPA restrictions that are "directly related to effluent limitations" in that they "direct∏" the regulated community "to engage in specific types of activity." Am. Paper Inst., Inc. v. EPA, 890 F.2d 869, 877 (7th Cir. 1989) ("Am. Paper I"). These types of "other limitations" fall within Subsection (E) even if they do not meet the technical definition of "effl ent limitation" because they do not limit dischargesby point sources. The EPA, for example, regulates a point source's intake structures by addressing how it receives water. These regulations are not "effluent limitations." Yet the phrase "other limitation" allows circuit courts to consider the regulations along side simultaneously issued effluent limita tions. E.g. ConocoPhillips Co. v. EPA, 612 F.3d 822, 831 (5th Cir. 2010); cf. PUD No. 1 of Jeffe rson Cty. v. Wash. Dep't of Ecology, 511 U.S. 700, 713 (1994).

Third, a limitation must be approved or promulgated "under"—i.e., "according to" —"section 1311, 1312, 1316, or 1345. " See Black's Law Dictionary 1368 (5th ed. 1979). This prepositional phrase clarifies that Subsection (E) "cover[s] a specific set of EPA" restrictions because each of the four sections directs the EPA to issue specific regulations. Friends of the Earth v. EPA , 333 F.3d 184, 190 (D.C. Cir. 2003). Section 1311 tells the EPA to establish technology-based limitations for existing sources. 33 U.S.C. § 1311(b)(1)(A), (2)(A). Section 1312 directs the EPA to establish water-quality limitations for more polluted water bodies. Id. § 1312(a). Section 1316 directs the EPA to establish limitations on new sources. Id. § 1316(b)(1)(B). And § 1345 directs it to establish limitations on sewage sludge. Id. § 1345(d).

Conversely, under basic interpretative princ iples, a limitation does not fall within Subsection (E) if the EPA's authority to establish it springs from another section. "It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," "if the references to particular sections were not meant to exclude ot hers." Longview Fibre Co. v. Rasmussen , 980 F.2d 1307, 1313 (9th Cir. 1992). Circuit courts , for example, have uniformly held that Subsection (E) does not cover the "total maximum daily loads" that States adopt to achieve their water-quality standards because the authority to issue those restrictions arises from § 1313. Id. at 1312-13; Friends of the Earth ,

333 F.3d at 190; Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 516-18 (2d Cir. 1976).

b. The Rule does not meet Subsection (E)'s requirements for two reasons: (1) the EPA did not "promulgate" an "effluent or other limitation," and (2) the EPA did not issue the Rule "under section 1311, 1312, 1316, or 1345."

To begin with, the Rule does not directly "promulgate" an "effluent limitation or other limitation." As the Agencies admit, the Rule does not issue an "effluent limitation" because it nowhere announces restrictions on the polluta nts that point sources may discharge. 33 U.S.C. § 1362(11); P et. App. 9a (McKeague, J., op.). Nor can the Rule be considered the "promulgation" of an "other limitation" because it also does not directly issue any restriction. contrary, the Rule d isclaims doing so. It "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "imposes no enforceable duty" on "the private sector," id. at 37,102. Instead, the Rule "sets the jurisdictional reach for whether the discharge limitations even a pply in the first place." Pet. App. 32a (Griffin, J., concurring in judgment).

In addition, the EPA did not issue the Rule according to the authority of "section 1311, 1312, 1316, or 1345." The Rule does not accomplish the a ctions that those sections direct EPA to undertake: It sets no technology-based limits under § 1311, w aterquality limits under § 1312, new-source limits under § 1316, or sewage -sludge limits under § 1345. The Rule instead interprets language—"waters of the United States"—found only in a definitional section. 33 U.S.C. § 1362(7). If Congress gave the EPA the authority to clarify the meaning of § 1362's defini-

tions, that authority would spring from 33 U.S.C. § 1361. Section 1361 allows it "to prescribe such regulations as are necessary to carry out [its] functions under this chapter." *Id.* § 1361(a).

Far from tailored to Subsection (E)'s listed tions, moreover, the Rule's "defin ition will apply to all provisions of the Act." 80 Fed. Reg. at 37,104. will govern many sections —such as § 1313 (which addresses state water-quality stan dards) or § 1344 (which addresses the Corps permitting pro that are not within § 1369(b)(1)'s reach. Subsection (E)'s citation of § 1311, 1312, 1316, and 1345 should not be read to r each such general regulations for the entire Act. Indeed, even if those four sections were removed from the Act, t hat removal would not change whatever authority the Agencies have to clarify the mea ning of "wa ters of the United States" in § 1362. That is also why both Agencies, not just the EPA, issued the Rule. It covers provisions within the Corps' domain under § 1344. See 80 Fed. Reg. at 37,115-119. That § 1369 grants jurisdiction over EPA actions, not actions of both Agencies, that the multi-agency Rule should not be read as the type of EPA action contemplated by Subsection (E).

c. Only the lead opinion below found Subsection (E)'s text expansive enough to cover the Rule. Pet. App. 8a-17a (McKeague, J., op.). Even that opinion conceded that the Agencies' interpretation was "not compelling." *Id.* at 9a. It nonetheless accepted the argument that the Rule was the "promulgation" of an "other limitation" "under § 1311" based on a "pract ical construction." *Id.* at 10a. This reading is wrong both as a matter of text and as a matter of precedent.

Text. The Agencies argue that the Rule can be seen as the "promulgation" of an "other limitation" "under § 1311" because its "practical effect will be to indirectly produce various limitations on point-source operators and permit is suing authorities." Pet. App. 17a (McKeague, J., op.); see id. at 9a. By expanding the "waters of the United States" subject to the Act, this argument goes, the Rule triggers limitations found elsewhere, including § 1311(a)'s ban on discharges. Id. at 15a-17a. Subsection (E)'s text cannot extend this far.

As an initial matter, the Agencies read "limit ation" in isolation rather than in the context of the entire phrase "approving or promulgating any effl uent limitation or other limitation under section 1311, 1312, 1316, or 1345." A reasonable reader of the phrase "promulgating or approving a "limitation" would interpret it to mean that the thing being issued or approved *itself* must be the limitation. Yet the Agencies' argument hinges on limitations found in the Act rather than the Rule. They say that the Rule makes more lands subject to § 1311(a)'s ban on discharges. Br. in Opp. 13. But Congress (not the EPA) promulgated § 1311(a). Congress would have used a verb li ke "affecting" rather than "promulga ting" if it meant for Subsection (E) to reach regulations that implicate re strictions found elsewhere. When read in its entirety, therefore, Subsection (E) refers to "a specific set of EPA actions" —the r estrictions that the specific sections direct the EPA to promulgate. Friends of the Earth, 333 F.3d at 190.

In addition, other sections of the Act that use the phrase "effluent limitation or other limitation" all convey that the limitation is something that <code>itself</code>

can be violated—illustrating that it is the EPA regulation that imposes the restriction. Section 1341, for example, requires certain facilities to allow regul tors to review the ir operations to ensure "that appl icable effluent limitations or other limitations . . . will not be violated." Id. § 1341(a)(4). Section 1365 authorizes citizens to sue for a vi olation of an "effluent standard or limitation," defined as, among other things, "an effluent limitation or other limitation u nder section 1311 or 1312." Id. § 1365(a), (f). And the Act's whistleblower protections do not extend to e mployees who "delibe rately violate[] any prohibition of [an] effluent limitation or other limitation under se ction 1311 or 1312." Id. § 1367(d). The Rule, however, defines a phrase; it does not establish "any requlatory requirements" that can be violated. See 80 Fed. Reg. at 37,054.

The Agencies' broad interpretation of "limitation" also lacks a stopping point. If the y correctly read Subsection (E), this Court likely lacked jurisdiction in Sackett v. EPA, 566 U.S. 120 (2012). Sackett held that an EPA "compliance order" —an order fin ding lands to be waters of the United States and asserting penalties for discharges —was reviewable by a district court under the APA. Id. at 124, 131. This order did something similar to the Rule, but on a smaller scale. It decided that specific lands were waters of the United States, and so it too had a "practical effect" of "indirectly produc[ing] various limit ations," including § 1311(a)'s prohibition on discharges. See Pet. App. 17a (McKeague, J., op.).

Finally, even if the Rule could qualify as a "limitation," the Agencies have not shown that it was issued "under section 1311." The lead opinion suig-

gested that the Rule should be deemed issued "under section 1311" because the Rule identifies that section as authorizing the EPA to issue it. 80 Fed. Reg. at 37,055; Pet. App. 15a -16a n.4 (McKeague, J., op.). But the Rule identifies the *entire* Act as providing the EPA with the authority to issue it, and it lists several sections (such as § § 1321 and 1344) that are not identified in Subsection (E). 80 Fed. Reg. at 37,055. Nor should courts blindly defer to the Age ncies' position that the y issued the Rule "under section 1311." The Act does not "empower the [EPA]. after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an ["other limitation" "under section 1311"] by [its] mere design ation" as such in the regulation. See Adamo Wrecking Co. v. United States, 434 U.S. 275, 283 (1978).

Precedent. To expand Subsection (E), the lead opinion below rested on *E.I. du Pont*. That case, the lead opinion suggested, adopted a pragmatic a proach to S ubsection (E), and thus unmoored its scope from "a literal reading of the p rovision." Pet. App. 10a (McKeague, J., op.) . *E.I. du Pont* cannot bear the weight that the Agencies place on it.

While *E.I. du Pont* invoked practical concerns, it did so only to reinforce the text. That case concerned effluent limit ations that were is sued under § 1311 and so fell within Subsection (E)'s core. The Court "regard[ed] [§ 1369](b)(1)(E) as *unambiguously* authorizing court of appeals review of EPA action promulgating an effluent limitation for existing point sources under [§ 1311]." 430 U.S. at 136 (emphasis added). The challengers, however, argued for an *atextual* view of Subsection (E), one permitting review only "of the grant or denial of an individual var-

iance" from those limits under § 1311(c). *Id*. The Court disagreed. *Id*. Conducting a close textual analysis, it noted that "Congress referred to specific subsections of the Act" elsewhere in § 1369(b)(1), and "presumably would have specifically mentioned [§ 1311](c) if only action pursuant to that subsection were intended to be reviewable in the court of a ppeals." *Id*.

Only "after a plain textual rejection of the industry's position," Pet. App. 35a (Griffin, J., concurring in judgment), did the Court add practical concerns. Interpreting Subsections (E) and (F) together, it noted that a contrary reading "would produce the truly perverse situation in which" circuit courts "review numerous individual actions issuing or denying permits" under Subsection (F), but not "the basic regulations governing those individual actions" under Subsection (E). E.I. du Pont, 430 U.S. at 136. E.I. du Pont thus relied on practical concerns to reinforce Subsection (E)'s language; it did not grant circuit courts a freewheeling license to depart from the language based on those concerns.

The lead opinion also cited three circuit cases that allegedly justified the abandonment of Subsection (E)'s text. Pet. App. 11a-13a (McKeague, J., op.). The cases do no such thing.

Natural Resources Defense Council, Inc. v. EPA, 673 F.2d 400 (D.C. Cir. 1982) ("NRDC") (Ginsburg, J.), addressed "Consolidated Permit Regula tions" that made compliance with § 1311's limitations a "permit condition" and defined how to calculate those limitations for permits. Id. at 401, 404-05. Because the regulations "restrict[ed] who may take advantage of certain provisions or otherwise guide[d] the setting

of nume rical limitations in permits," they qualified as § 1311 limitations. *Id.* (emphasis added). *NRDC* thus involved "EPA actions expressly specified in" Subsection (E). Friends of Eart h, 333 F.3d at 184 n.15 (discussing *NRDC*).

Virginia Electric and Power Co. v. Costle , 566 F.2d 446 (4th Cir. 1977), addressed regulations governing "cooling water intake structures." *Id.* at 449-50. These are "other limitations." *See PUD No. 1*, 511 U.S. at 713. As the Fourth Circuit noted, the Act expressly requires limitations that are issued under § 1311 (for existing sources) and § 1316 (for new sources) to include these intake-structure restrictions. *Va. Elec.*, 566 F.2d at 450; *see* 33 U.S.C. § 1326(b). B ecause the intake -structure restrictions were "closely related" to effluent limitations, it would have been "anomalous" to bifurcate review of them. *Va. Elec.*, 566 F.2d at 450; *cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

Finally, *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), addressed EPA letters concerning practices by "publicly owned treatment works." *Id.* at 854, 856. The court ruled that an EPA action qualifies as an "other limitation" under Subsection (E) if "e ntities subject to the [Act's] permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes." *Id.* at 866 (emphasis added). Applying that interpretation, it held that an EPA letter restricting the manner in which those treatment works *internally* treated wastewater qualified as an "other limitation" under § 1311(b)(1)(B). *Id.*

- 2. The Rule fall's outside Subsection (F) because it does not "issue or deny" a permit under § 1342
- a. Subsection (F) grants jurisdiction over EPA action (1) "issuing or denying" "any permit" (2) "under section 1342." 33 U.S.C. § 1369(b)(1)(F). This language has two elements.

First, "[b]y its plain terms, this provision cond itions the availability of judicial review on the issuance or denial of a permit." Rhode Island v. EPA, 378 F.3d 19, 23 (1st Cir. 2004). The verb choices make this clear. To "deny" a permit, the EPA must "withhold the possession, use, or enjoyment of" the permit. The Random House Dictionary of the English Language 533 (2d ed. 1987) (defining "deny"); see Webster's, supra, at 378 (defining "deny" as "to refuse the use of or access to"). Thus, this Court has read the word "deny" to cover an EPA action that vetoes a state-issued permit, because the EPA's veto had the "precise effect" of a denial. Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196 (1980).

To "issue" a permit, the EPA must "give [it] out publicly or officially." Webster's, supra, at 749. The EPA regularly does so. E.g., Nat. Res. Def. Council v. EPA, 808 F.3d 556, 562 (2d Cir. 2015) (cha llenge to "Vessel General Permit"); City of Pittsfield v. EPA, 614 F.3d 7, 8 (1st Cir. 2010) (challenge to permit for wastewater treatment plant). Yet, as circuit courts have agreed, under no fair reading of "issue" could the verb cover the EPA's failure to object to, and thus silent approval of, a state-issued permit. E.g., Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218, 1221 & nn.7, 12 (6th Cir. 1992).

Second, the permit must issue "under" § 134 2. That section identifies the permitting program run by the EPA (or state authorities) for pollutants that "readily wash downstream." See Rapanos, 547 U.S. at 723 (plurality op.). The EPA, by contrast, lacks authority to issue permits for dredged or fill material—which fall within the Corps' domain u § 1344. Coeur Ala., Inc. v. Se. Ala. Conservation Council, 557 U.S. 261, 27 3-74 (2009). The Act thus splits judicial review for permit decisions. It requires circuit review of EPA permitting under § 1342, e.g., City of Pittsfield, 614 F.3d at 8, but district review of Corps permitting under § 1344, e.g., Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs , 417 F.3d 1272, 1277 (D.C. Cir. 2005).

- b. The Rule does not fall within Subsection (F). The Agencies have *never* argued that the Rule "issues" or "denie s" a permit to discharge pollutants under § 1342. *E.g.*, Pet. App. 18a-19a (McKeague, J., op.). Yet the language is plain. Subsection (F) unambiguously requires the EPA to have issued or denied a permit under § 1342. That ends the matter.
- c. Despite the plain text, the Agencies stretch Subsection (F) to encompass *all* EPA regulations that "impact permitting requirements" or "affect[] the granting and denying of permits." Pet. App. 18a (McKeague, J., op.) (emphasis added). Here again, neither the statute's text nor this Court's cases support the Agencies' reading.

As for text, the Agencies assert that the Rule falls within Subsection (F) because it "delineates where permits are required and so sets the entire NPDES permitting scheme in motion." Br. in Opp. 14. This argument rewrites Subsection (F) from "i ssuing or

denying a ny permit" to "affecting or relating to the permitting scheme." The EPA cannot do that. "An agency has no power to 'tail or' legislation to burea ucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

As for precedent, the Agencies cite *E.I. du Pont* and *Crown Simpson* for their view. Br. in Opp. 14 - 15. Neither decision helps them. *E.I. du Pont* did not even involve Subsection (F). It interpreted Subsection (E). *See* 430 U.S. at 136.

Crown Simpson, as noted, held that the veto of a state-issued permit qualified as the "denial" of permit under Subsection (F). 445 U.S. at 196-97. To reach that result, the Court started with the text: "When EPA, as here, objects to effluent limitations contained in a state -issued permit, the precise effect of its action is to 'den[y]' a permit within the mea ing of [Subsection (F)]." *Id.* (emphasis added). cause the EPA veto "refuse[d] the use of or access to" the permit, it could be comfortably read as den ying the permit. Webster's, supra, at 378. Only after concluding that the EPA veto qualified as a denia l di d the Court add a pragmatic point. The review process for permits should not depend "on the fortuitous ci rcumstance of whether the State in which the case arose was or was not authorized to issue permits." 445 U.S. at 196-97. This language is best read as using context to confirm what is otherwise a reasonable reading of the text. That is commonplace. "Adhering to the fair meaning of the text (the textualist's touchstone) does not limit one to the hype rliteral meaning of each word in the text." Scalia, supra, at 356.

Thus, even if Crown Simpson "opened the door to constructions other than a strict literal application," Pet. App. 17a (McKeague, J., op.) (emphasis added), there is a wide gap between the at case and this one. Here, the Agencies have not offered any reading of the phrase "issuing or denying a ny permit" that could encompass the Rule. Instead, they bypass the text by jumping immediately to their pragmatic point about the efficiencies of circuit review. Br. in Opp. 14-15. It is one thing to rely on a pragmatic factor to choose between two plausible interpretations of a text (as Crown Simpson did). It is quite another to rely on that factor to *depart* from the only plausible reading of the text (as the Agencies do). Such a contextual consideration can inform an a mbiguous text: it cannot rewrite an unambiguous one.

Finally, the concurring opinion below reached its result only because it felt bound by National Cotton Council of America v. EPA , 553 F.3d 927 (6th Cir. 2009), which read Subsection (F) to cover rules affecting permits. Pet. App. 42a-44a (Griffin, J., concurring in judgment). This Court, of course, is not so bound. It should reject National Cotton for the reasons that the concurrence gave. National Cotton's "incorrect" "jurisdictional reach . . . has no end ." Id. at 42a, 44a. And that decision "provided no analysis" of Subsection (F)'s text. Friends of the Ever glades v. EPA, 699 F.3d 1280, 1288 (11th Cir. 2012).

* * *

In sum, this case is straightforward under the only reasonable reading of Subsections (E) and (F). The Rule neither promulgates effluent or other limitations under § 1311, 1312, 1316, or 1345, nor issues or denies permits under § 1342.

B. Section 1369(b)(1), When Read As A Whole, Reinforces That Subsections (E) And (F) Do Not Cover The Rule

Reading § 1369(b)(1) as a whole and against the backdrop of the entire Act confirms that Subsections (E) and (F) cannot have the breadth that the Age ncies seek to give them.

1. Reading § 1369(b)(1) As A Whole. "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Sturgeon v. Frost, 136 S. Ct. 1061, 1070 (2016) (quoting Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350, 1357 (2012)). This canon reinforces the plain language of Subsections (E) and (F).

Section 1369(b)(1) authorizes circuit review over seven specific EPA actions down to the subsections under which some of those actions are authorized. As one example, Subsections (A), (B), and (E) identify EPA actions under § 1316. (Subsection (B) accidentally refers to a new-source variance provision that was within a draft of § 1316 but did not make it into the final law.) It is noteworthy that Congress acted with this specificity in the context of a complex statute. "No sensible pe rson accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designa ted." Longview, 980 F.2d at 1313. This drafting precision demonstrates that § 1369(b)(1)'s seven subsections should not be read loosely to gobble up provisions that are otherwise absent from that section.

Indeed, a comparison of § 1369(b)(1) to the judicial-review provision in the Clean Air Act confirms that § 1369(b)(1) should be read according to its text. Both Acts have judicial -review provisions cataloging actions that circuits may r eview, but the Clean Air Act goes further by providing circuit jurisdiction over "any other final action of the Administrator." 42 U.S.C. § 7607(b)(1) (emphasis added); Harrison v. PPG Indus., 446 U.S. 578, 589 (1980) . The Clean Water Act contains no similar catch -all. The conclusion to be drawn could not be clearer: Congress knows how to provide for circuit review of all agency action. It did so under the Clean Air Act, but not under the Clean Water Act. Cf. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174-75 (2009). This Court must respect that choice.

The Agencies' reading fails to do so. If this Court "exceptionally expansive view adopts their § 1369(b)(1) could "encompass virtually all EPA a ctions under the" Act. North Dakota v. EPA , 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). Take the Agencies' broad reading of "other limitation" "under § 1311" within Subsection (E). They say that the Rule qualifies because § 1311(a) (like many sections) places restrictions on discharges into waters of the United States. Br. in Opp. 13-14. Yet § 1311 references many things. This Court, for example, has recognized that it "incorporates" "by reference" § 1313 (the section on state water-quality standards). PUD No. 1, 511 U.S. at 713; 33 U.S.C. § 1311(b)(1)(C). But the EPA has repeatedly argued against a reading of "other limitation" "under § 1311" that would include its approval or promulgation of the "total maximum daily loads "that are authorized by § 1313. E.g., Friends of Earth, 333 F.3d at 187-93. The Agencies

cannot re concile their *traditional* view that a total maximum daily load is not an "other limitation" "under 1311" with their *current* view that a rule defining waters of the United States is.

The Agencies' reading of "issuing or den ying any permit" under Subsection (F) suffers from similar problems. If adopted, it could permit review over a ctions that Congress intentionally excluded. All agree, for example, that Corps permitting dec isions under § 1344 do not fall within Subsection (F). But the Agencies' b road reading of that subsection has allowed them to seek review over the amen dments to the Corps' permitting regulations that are at issue here. *E.g.*, 80 Fed. Reg. at 37,115-119.

2. Rule Against Superfluity. "It is 'a[nother] cardinal principle of sta tutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

The circuit courts have applied this principle to § 1369(b)(1). Many courts, for example, have consi dered whether circuit courts have jurisdiction under Subsection (G)—which covers EPA actions in "promulgating" individual control strategies under § 1314(l)—over an EPA action approving a state-promulgated individual control strategy. E.g., Roll Coater, 932 F.2d at 670-71. Pointing to Subsection (E), which unlike Subsection (G), does use both "a pproving" and "promulgating," the courts have found jurisdiction lacking based on the rule against superfluity. Id. They have refused to write the verb "a pproving" out of Subsection (E) by reading the verb

"promulgating" in Subsections (E) and (G) broadly to cover both actions. See id.

This canon undercuts the Agencies' broad reading of Subsections (E) and (F). As for Subsection (E), a broad reading of "other limitation" "under 1311" would render other language in § 1369(b)(1) superfluous. If, for example, the Rule was issued unde § 1311 merely because the phrase "navigable waters" is referenced in that section, Congress had no reason to include "under § 1312" within Subsection (E). That is because the water -quality limitations in § 1312 are likewise referenced in § 1311. 33 U.S.C. § 1311(b)(1)(C). "Thus, if accepted, [the Age ncies'] reading would render [Subsection (E)'s] specific re ference to section 1312 duplicative and unnece ssary." Friends of the Earth, 333 F.3d at 190. More generally, a broad reading of "other limitation" "under § 1311" allow s that phrase " to swallow up distin ctions that Congress made between effluent limit ations and other types of EPA regulations" in § 1369(b)(1). Am. Paper I, 890 F.2d at 876-77.

As for Subsection (F), the Agencies' argument that iss uing or denying a permit under § 1342 extends to regulations that "impact permitting r equirements" would render many provisions superfluous. Pet. App. 18a (McKeague, J., op.). Section 1342 mandates that permits "meet . . . all applicable r equirements und er sections 1311, 1312, 1316, 1317, 1318, and 1343." 33 U.S.C. § 1342(a)(1). So nearly every regulation could affect permitting in some way. Section 1369(b)(1) (C), for example, grants jurisdiction over an action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317" for toxic pollutants. If Subsection

(F) includes all regulations *affecting* permitting, Congress had no reason to adopt this jurisdictional grant for § 1317's toxic -pollutant limit ations. Section 1342 *expressly* identifies compliance with § 1317 limitations as a condition for permit issuance, so those § 1317 limitations will, by definition, affect permitting.

C. Background Presumptions For Interpreting Statutes Support The Plain Text

The plain-text reading, lastly, is supported by two background presumptions: (1) that jurisdictional provisions be read to establish clear rules and (2) that statutes be read to permit judicial review over agency action. The Agencies, by contrast, mistakenly invoke a competing presumption in favor of immediate appellate review that does not apply here.

1. This Court's preference for bright -line jurisdictional rules supports a plain -text approach to § 1369(b)(1)

Because § 1369(b)(1) concerns jurisdiction, it should be interpreted a swritten. The plain text — not the Agencies' "pragmatic" gloss on that text—sets the *clearer* boundary between the jurisdiction of the circuit courts under § 1369 (b)(1) and the jurisdiction of the district courts under the APA.

a. "'Jurisdictional rules," the Court has noted, "'should be clear." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (citation omitted). The Court thus has an established "practice of rea ding jurisdictional laws, so long as consistent with their language, . . . to estab lish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016).

This practice is a fixture of the Court's precedent. It has, for example, adopted a clear rule to ide ntify a corporation's "principal place of business" under the diversity-jurisdiction statute (28 U.S.C. § 1332) because "administrative simplicity is a major virtue in a jurisdictional statute." Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010). It has done the same when inter-"final decision" under preting the appe llatejurisdiction statute (28 U.S.C. § 1291), recogni zing that "[c]ourts and litigants [were] best served by [its] bright-line rule." Budinich v. Becton Dicki nson and Co., 486 U.S. 196, 202 (1988). Most famously, the Court has for over a century fo llowed the "well pleaded complaint rule" under the federal-questionjurisdiction statute (28 U.S.C. § 1331), praising the "clarity and simplicity of that rule." Vaden v. Discover Bank, 556 U.S. 49, 60 (2009); Louisville & Nas hville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

Many reasons justify this approach. To begin with, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." Hertz, 559 U.S. at 94. With vague rules, by contrast, "an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases." Sisson v. Ruby, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (quoting Zecheriah Chafee, The Thomas M. Cooley Lectures, Some Problems of Equity 312 (1950)). These costs "diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." Hertz, 559 U.S. at 94.

Further, "[t]he stakes of the inquiry are high[er]" in the jurisdictional context. Herr v. U.S. Forest